UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH VINCENT WARD,

Petitioner,

v.

SUZANNE M. PEERY,

Respondent.

No. 2:21-cv-2220 DAD KJN P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner, proceeding pro se, with a fully exhausted petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges his 2018 conviction for murder. This case was briefed and submitted for decision on March 17, 2022. Subsequently, on January 9, 2023, petitioner filed a motion for stay and abeyance under Rhines v. Weber, 544 U.S. 269, 276 (2005). Petitioner also filed a motion to compel discovery. As discussed below, the undersigned recommends that both motions be denied.

Motion for Stay and Abeyance

Legal Standards

Exhaustion of State Court Remedies

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each habeas claim

before presenting it to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). The prisoner must "fairly present" both the operative facts and the federal legal theory supporting his federal claim to the state's highest court, "thereby alerting that court to the federal nature of the claim." Baldwin v. Reese, 541 U.S. 27, 29 (2004); see Kelly v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007). The United States Supreme Court has held that a federal district court may not entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982).

Stay and Abeyance

Petitioner's pursuing petitions containing both exhausted and unexhausted claims (a "mixed" petition) or petitions containing fully unexhausted claims may seek stays where (i) "the petitioner has good cause for his failure to exhaust," (ii) "his unexhausted claims are potentially meritorious," and (iii) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." Rhines, 544 U.S. at 277-78; Mena v. Long, 813 F.3d 907, 912 (9th Cir. 2016) (noting that a district court has the discretion to stay and hold in abeyance both partially and fully unexhausted petitions under the circumstances set forth in Rhines).

On the other hand, where a petitioner seeks to stay a fully exhausted petition, a stay under Rhines is not available. Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005); Wright v. Gastello, 2020 WL 5356697, *2 (C.D. Cal. June 25, 2020) (collecting district court cases finding Rhines stay inapplicable to fully exhausted petitions). Rather, under such circumstances, a petitioner may seek a Kelly stay using the following process: (1) the court stays and holds in abeyance the fully exhausted petition, allowing petitioner the opportunity to return to state court to exhaust the unexhausted claims; and (2) petitioner later moves to amend his petition and reattaches the newly exhausted claims to the original petition. Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003). This is a more cumbersome procedure than a Rhines stay because it requires petitioner to file an amended federal habeas petition, but it does not require petitioner to show good cause for the failure to exhaust. See King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009), cert. denied, 130 S. Ct. 214

(2009). However, because the filing of a federal petition does not toll the statute of limitations, a Kelly stay does nothing to protect a claim from being barred by the statute of limitations unless the new claim shares a "common core of operative facts" with the claims raised in the original petition. Mayle v. Felix, 545 U.S. 644, 659 (2005). In other words, any newly exhausted claims a petitioner seeks to add to a pending federal habeas petition must be timely or relate back to claims contained in the original petition that were exhausted at the time of filing. See King, 564 F.3d at 1143.

The Parties' Arguments

In the instant petition, petitioner claims that the jury's verdict finding him competent to stand trial was not supported by substantial evidence. (ECF No. 1 at 6.) Petitioner seeks to stay this case pending exhaustion of the following seven new claims: ineffective assistance of counsel for failure to investigate; inadequate evidence to convict; prosecution investigator is known to fabricate false evidence; failure to provide a sixty day speedy trial; violation of petitioner's Sixth Amendment rights; failure of trial court to grant two Marsden motions; and failure to "honor established judicial procedures." (ECF No. 19 at 3-6.)

Petitioner's Motion

Petitioner claims there is good cause for his delay, based on the ineffectiveness of appellate counsel by failing to investigate, discover and present such claims on direct appeal. In addition, due to COVID-19, petitioner was continuously on modified program and quarantine and not allowed access to the law library. Further, petitioner was transferred to Corcoran State Prison, put in quarantine, and deprived of his personal and legal property for six weeks. The Corcoran library was only open two days a week. Petitioner argues that all seven of his putative claims are potentially meritorious. (ECF No. 19 at 3-7.) Petitioner contends he has not engaged in any intentional or dilatory delay tactics; he gathered as much information as possible and "filed his petition for writ of habeas corpus as promptly as possible." (ECF No. 19 at 7.)

Respondent's Opposition

Respondent counters that petitioner is not entitled to a stay under Rhines because the instant petition is wholly exhausted, and petitioner is not seeking to preserve the timeliness of

claims already asserted in the instant petition. Further, petitioner could not amend to include the proposed new claims because such claims are untimely. Petitioner filed no collateral actions in state court, and the statute of limitations period expired on October 10, 2022. Additionally, the proposed new claims do not relate back to petitioner's pending challenge to the jury's competence finding because they have nothing to do with the competency proceedings or the evidence supporting the jury's competency finding. (ECF No. 19 at 3-7.)

Respondent argues that petitioner fails to show good cause for his extreme delay in bringing the motion more than a year after he filed the instant petition, and his failure to commence state collateral review by April 25, 2023, all constitutes intentional delay. Petitioner knew what appellate counsel included in the direct appeal when appellant's opening brief was served on petitioner on January 8, 2020 (ECF No. 11-2 at 61), yet petitioner has not commenced state collateral review for over three years. Despite his complaints of COVID-19 and the incidents of prison life, petitioner has effectively litigated this case yet still waited over a year to file his motion attempting to include seven new claims. Nevertheless, generalized complaints about the incidents of prison life fail to demonstrate good cause. (ECF No. 22 at 4) (citing Palmero v. Robertson, 2020 WL 4674279, at *2 (E.D. Cal. Aug. 12, 2020) (allegations concerning modified program for law-library access based on COVID-19 were insufficient to show good cause when prisoner failed to show he could not access the library at all). Finally, petitioner's prior motion to stay demonstrates his awareness of the exhaustion requirement, yet he still has not filed a petition in state court. Such additional lengthy delay shows petitioner is intentionally dilatory.

Petitioner did not file a reply.

Discussion

As discussed above, and argued by respondent, because the original petition raises only an exhausted claim, petitioner is not entitled to a stay under Rhines. Jackson, 425 F.3d at 661. Because the sole claim in the petition is exhausted, the petition is not a "mixed" petition. Thus, a stay pursuant to Rhines is not appropriate. See Jackson, 425 F.3d at 661 (explaining that "Rhines applies to stays of mixed petitions" -- not "fully exhausted petitions").

Nevertheless, district courts have discretion to stay proceedings when confronted with a petition that contains only exhausted claims. Kelly, 315 F.3d at 1071; see also King, 564 F.3d at 1140-41 ("A petitioner seeking to use the Kelly procedure will be able to amend his unexhausted claims back into his federal petition once he has exhausted them only if those claims are determined to be timely. And demonstrating timeliness will often be problematic under the now-applicable legal principles."). Moreover, if the federal statute of limitations has already expired, a petitioner may amend a new claim into a pending petition "only if the new claim shares a 'common core of operative facts' with the claims in the pending petition." King, 564 F.3d at 1141 (quoting Mayle, 545 U.S. at 659). A new claim "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Mayle, 545 U.S. at 650.

Are Petitioner's New Claims Time-Barred?

Respondent argues that it would be futile to grant petitioner a stay because the proposed new claims are barred by the statute of limitations. Petitioner did not address the timeliness issue or file a reply.[1]

1. Legal Standards

A Kelly stay may be denied where the petitioner's new claims are deemed to be untimely and do not relate back to exhausted claims. King, 564 F.3d at 1141-42.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners which provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody, pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

[1] Plaintiff was provided the standards for seeking a Kelly stay in the April 3, 2023 order. (ECF No. 18 at 4.)

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244 (d)(1).

2. Discussion

Petitioner was convicted on August 1, 2018. (ECF No. 11-11 at 156 (CT 546).) He filed a petition for review in the California Supreme Court, which was denied on May 12, 2021. (ECF No. 11-8.) Petitioner then had 150 days to file a petition for writ of certiorari in the United States Supreme Court, which expired on Sunday, October 10, 2021.[2] Because the deadline fell on a Sunday, petitioner had until Monday, October 11, 2021, but did not file a petition for writ of certiorari. See Fed. R. Civ. P. 6(a)(1)(C) (when last day of period falls on Saturday, Sunday, or legal holiday, period continues to run until end of next day that is not Saturday, Sunday, or legal holiday). The AEDPA limitations period began running the next day, October 12, 2021, and expired on Wednesday, October 12, 2022.[3] See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th

[2] Normally, a petitioner has 90 days after the California Supreme Court denied review to file a petition for certiorari in the U.S. Supreme Court. See Zepeda v. Walker, 581 F.3d 1013, 1016 (9th Cir. 2009) ("The period of direct review after which a conviction becomes final includes the 90 days during which the state prisoner can seek a writ of certiorari from the United States Supreme Court.") However, "the U.S. Supreme Court temporarily extended the time to file a petition for writ of certiorari from 90 to 150 days for any deadline falling after March 19, 2020." Parker v. Johnson, 2023 WL 2558547, *7 (C.D. Cal. Jan. 13, 2023), citing see U.S. Sup. Ct. Order, Mar. 19, 2020, https://www.supremecourt.gov/orders/ordersofthecourt (rescinded July 19, 2021); see also (ORDER LIST: 589 U.S.); (ORDER LIST: 594 U.S.).

[3] Petitioner does not contend that he is entitled to a later trigger date under § 2244(d)(1)(B), (C), or (D), and no such basis is apparent in the record. Indeed, the nature of petitioner's proposed new claims are based on facts known to petitioner at least by the end of his trial. See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (limitation period begins running when petitioner knows or through diligence could have discovered important facts, not when he recognizes their legal significance). Also, petitioner does not rely on any state-created impediment. Under § 2244(d)(1)(B), the state action must be a violation of the Constitution or laws of the United States. See 28 U.S.C. § 2244(d)(1)(B); Mack v. Alves, 578 F. Supp. 3d 154, 157 (D. Mass. Dec. 30, 2021) (argument that COVID-19 prevented access to the library was not a state-created impediment that violated the Constitution or laws of the United States). In addition, "[t]o obtain

Cir. 2001) (holding that AEDPA limitation period begins running day after triggering event). Therefore, absent tolling, petitioner's proposed new claims would be time barred if petitioner attempted to amend the instant petition and add the proposed new claims.

Statutory Tolling

Title 28 U.S.C. § 2254(d)(2) provides for tolling where the prisoner properly files a state post-conviction application. Here, however, petitioner filed no collateral actions in state court. Also, petitioner is not entitled to any tolling for the period during which his current petition has been pending. See Duncan v. Walker, 533 U.S. 167, 180-81 (2001) (federal habeas petition does not toll limitation period because it is not "application for State post-conviction or other collateral review" within meaning of § 2244(d)(2)). Therefore, petitioner is not entitled to any statutory tolling and the limitations period expired on October 12, 2022.

Equitable Tolling

Neither party addressed whether equitable tolling applies. Equitable tolling of the statute of limitations is appropriate when the petitioner demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Holland v. Florida, 560 U.S. 631, 645 (2010). It is petitioner's burden to demonstrate that he is entitled to equitable tolling. Espinoza-Matthews v. California, 432 F.3d 1021, 1026 (9th Cir. 2005).

An "extraordinary circumstance" has been defined as an external force that is beyond the prisoner's control. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Holland, 560 U.S. at 653 (internal citations and additional quotation marks omitted). In addition, petitioner must demonstrate that the "'extraordinary circumstances' were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003), quoting Stillman v.

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relief under § 2244(d)(1)(B), the petitioner must show a causal connection between the unlawful impediment and his failure to file a timely habeas petition." Bryant v. Arizona, 499 F.3d 1056, 1060 (9th Cir. 2007) (lack of access to case law during the relevant time period was not an impediment for purposes of statutory tolling because it did not prevent [the petitioner] from filing his petition."). The petitioner must satisfy a "higher bar than that for equitable tolling" to qualify for the relief provided under § 2244(d)(1)(B). Ramirez v. Yates, 571 F.3d 993, 1000 (9th Cir. 2009).

LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003) ("petitioner entitled to equitable tolling 'since prison officials' misconduct proximately caused the late filing.'"). "Each of the cases in which equitable tolling has been applied have involved wrongful conduct, either by state officials or, occasionally, by the petitioner's counsel." Shannon v. Newland, 410 F.3d 1083, 1090 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006) (emphasis in original).

"The threshold necessary to trigger equitable tolling . . . is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (internal citations and quotations omitted). Equitable tolling is "a very high bar and is reserved for rare cases." Yeh v. Martel, 751 F.3d 1075, 1077 (9th Cir. 2014).

Here, the record demonstrates that petitioner has not been diligent in attempting to raise the proposed new claims. As pointed out by respondent, petitioner was served a copy of appellate counsel's opening brief on appeal on January 8, 2020, which demonstrated counsel only pursued the competency claim. (ECF No. 11-2 at 61.) Despite such knowledge, petitioner has not commenced state collateral review for over three years. Further, even though petitioner first moved to stay this action on January 9, 2023, showing his awareness of the exhaustion requirement, petitioner has still not filed a petition for writ of habeas corpus in state court almost four months later. Such additional delay suggests he is intentionally delaying the pursuit of the proposed new claims in state court.

As to extraordinary circumstances outside his control, petitioner fares no better.

First, petitioner's generalized statement that COVID-19 kept him "on modified program continuously and quarantined and was not allowed access to the law library," does not warrant equitable tolling. (ECF No. 19 at 2.) Petitioner provides no specific dates or documentation confirming such modified program or explaining what the modified program entailed. Such a generalized allegation concerning COVID-19's impact is insufficient to justify equitable tolling. See Cervantes v. Cisneros, 2022 WL 4082488, at *5 (C.D. Cal. July 28, 2022) (petitioner's generalized allegations concerning COVID-19's effect on access to law library were insufficient to warrant equitable tolling), accepted by 2022 WL 4088064 (C.D. Cal. Sept. 6, 2022); Edgin v. Covello, 2021 WL 4355333, at *4-5 (N.D. Cal. Sept. 24, 2021) (same); Sauceda-Contreras v.

Spearman, 749 F. App'x 500, 502 (9th Cir. 2018) (affirming district court's dismissal of petition as untimely when petitioner "failed to support his conclusory assertions" with actual evidence); Jackson v. Evans, 286 F. App'x 516, 516 (9th Cir. 2008) (holding that "only vague allegations" that petitioner had been denied access to prison library did not warrant equitable tolling when he failed to show that such restrictions proximately caused delay in filing federal petition).

Moreover, while petitioner claims he was not allowed access to the law library, he does not demonstrate that he was unable to access the library's materials by other methods, such as a prison paging system, or that those methods were inadequate. See, e.g., Sholes v. Cates, 2021 WL 5567381, at *5 (E.D. Cal. Nov. 29, 2021) (holding that COVID-19 restrictions did not warrant equitable tolling as general matter and observing that availability of prison paging system showed that petitioner could access library materials at all relevant times); report and recommendation adopted, 2022 WL 4072862 (E.D. Cal. Sept. 2, 2022); Palmero, 2020 WL 4674279, at *2 (allegations concerning modified program for law library access based on COVID-19 were insufficient to establish good cause when prisoner failed to show he could not access library at all), accepted by 2020 WL 5701928 (E.D. Cal. Sept. 24, 2020).

Second, petitioner claims that upon his transfer to Corcoran State Prison, he was put in quarantine and deprived of all of his property, including legal property, for six weeks, and the Corcoran law library was only open two days a week. (ECF No. 19 at 2.) However, petitioner provided no dates -- he does not state when he was transferred to Corcoran or what date his legal property was returned to him. (Id.)

A petitioner may be entitled to equitable tolling if the petitioner can demonstrate that external forces not the lack of diligence was the cause of the late filing. Miles, 187 F.3d at 1107. "[P]etitioner must [] show that the extraordinary circumstances were the cause of his untimeliness and that the extraordinary circumstances made it impossible to file a petition on time." Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (internal quotation marks and citations omitted) (explaining that "a complete lack of access to a legal file may constitute an extraordinary circumstance"); Espinoza-Matthews, 432 F.3d at 1028 (finding pro se habeas petitioner was

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entitled to equitable tolling because despite his diligence he was deprived of his legal papers for 11 months of the one-year AEDPA limitations period.).

The instant court record reflects that petitioner filed a change of address to Corcoran on June 21, 2022. (ECF No. 13.) Petitioner's filing was not dated, and he does not indicate the date of his transfer. However, even if the six week deprivation began on June 21, 2022, it would have ended on Tuesday, August 2, 2022, leaving petitioner seventy days in which to bring his claims to federal court. See Gray v. Zatecky, 865 F.3d 909, 912-13 (7th Cir. 2017), cert. denied, 2018 WL 692446 (U.S. 2018) (holding petitioner was not entitled to equitable tolling based on a 113-day delay in receiving his case records from the state court and limited access to the institution's law library; he still had 43 days after he received his case files from the state court to file his federal petition and, although he had restricted access to legal resources during this period, "he did not make as compelling a showing" as the prisoner in Socha v. Boughton, 763 F.3d 674 (7th Cir. 2014), "who was almost totally deprived of meaningful library access because of his placement in administrative segregation"). Unlike the prisoner in Espinoza-Matthews, petitioner was deprived of his legal property for six weeks, and it was not the last six weeks of the limitations period. Thus, granting petitioner equitable tolling for the six week period would not render his proposed new claims timely.

Relation Back

Because the proposed new claims are untimely, petitioner must show that each claim relates back to his properly filed claim in order to include the putative claim in any amended petition. See Mayle, 545 U.S. at 655 (citing Fed. R. Civ. P. 15(c)); Nguyen v. Curry, 736 F.3d 1287, 1296 (9th Cir. 2013), abrogated on other grounds by Davila v. Davis, 137 S. Ct. 2058 (2017). A new claim does not "relate back" to the filing of an exhausted petition simply because it arises from "the same trial, conviction, or sentence." Mayle, 545 U.S. at 662-64. Rather, it must share a "common core of operative facts" with a timely claim in the pending petition. Id. at 664. Therefore, an amended petition "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650. The "time and type" language in

Mayle refers "not to the claims, or grounds for relief" but "to the facts that support those grounds." Nguyen, 736 F.3d at 1297 (emphasis in original).

In the instant petition, petitioner raises only one claim: the jury verdict finding petitioner competent to stand trial was not supported by substantial evidence. (ECF No. 1 at 6.) As argued by respondent, none of the seven new claims proposed by petitioner "have anything to do with the evidence supporting the jury's competency finding, or apparently anything to do with the competency proceedings." (ECF No. 22 at 4, citing ECF No. 3-7.) Analysis of petitioner's proposed new claims --

- ineffective assistance of counsel for failure to investigate a recording of witnesses, not objecting to the second interview of petitioner by detectives; and failing to remove Deputy Mackey who was impeached for his reputation of incompetence, fabrication and dishonesty;
- inadequate evidence to convict because no murder weapon was found, and no witness testimony connected petitioner with the crime;
- prosecution investigator is known to fabricate false evidence;
- failure to provide a sixty day speedy trial;
- trial court knowingly allowed deliberately elicited statements elicited by detectives to be used against petitioner in violation of his Sixth Amendment rights;
- failure of trial court to grant two Marsden motions; and
- failure to "honor established judicial procedures" related to the court's failure to let detectives testify about the interview

--will not rely on any of the facts reviewed for petitioner's competency claim. Indeed, all of petitioner's proposed new claims are unrelated to petitioner's challenge to the jury's competency verdict.[4]

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[4] Although petitioner claims that his trial was delayed by the competency proceedings, mentioned in putative claim four, evaluation of whether or not petitioner's speedy trial rights were violated would not require an evaluation of facts related to the issue of whether or not petitioner was competent to stand trial.

Because petitioner's proposed new claims are untimely and do not relate back to petitioner's one exhausted claim, a motion for stay under Kelly should also be denied. See, e.g., Lopez v. Tampkins, 2018 WL 6038325, at *3 (C.D. Cal. Sept. 28, 2018) ("Because petitioner's unexhausted claims [in mixed petition] are already barred by the statute of limitations, staying the action to permit him to seek amendment in the future would be futile."); Labon v. Martel, 2015 WL 1321533, at *8 (C.D. Cal. Mar. 17, 2015) (finding Kelly stay futile where unexhausted claims were untimely and did not relate back to exhausted claims in mixed petition); Spivey v. Gipson, 2013 WL 4517896, at *9 (E.D. Cal. Aug. 26, 2013) (recommending denial of Kelly stay when addressing motion to amend to add unexhausted claims to fully exhausted petition, construed as a motion for stay, finding Spivey's proposed new claims were untimely and would not relate back to exhausted claims.), report and recommendation adopted, 2013 WL 5671635 (E.D. Cal. Oct. 17, 2013); Broadnax v. Cate, 2012 WL 5335289, at *12 (S.D. Cal. Oct. 26, 2012) (denying Kelly stay of fully exhausted petition where proposed and currently unexhausted claims already time barred).

Motion to Compel Discovery

Petitioner seeks a court order requiring the production of all of the discovery presented by the district attorney in petitioner's underlying criminal case, F17-000213, including an alleged secret tape recording of four witnesses interviewed by Nevada County Sheriff's Deputy Mackey, seven to eight hours long, which petitioner claims "has exculpatory evidence." (ECF No. 20 at 2.) Respondent opposes the motion, arguing that all new evidence is barred by 28 U.S.C. § 2254(d), and petitioner must first exhaust the claims he seeks to support with such new evidence in state court as well as seek to develop such evidence in state court. Further, respondent objects that petitioner seeks such discovery from a nonparty, the Nevada County prosecutor. As discussed below, petitioner's motion should be denied.

Although a habeas proceeding is a civil suit, a habeas petitioner "does not enjoy the presumptive entitlement to discovery of a traditional civil litigant." Rich v. Calderon, 187 F.3d 1064, 1068 (9th Cir. 1999), cert. denied, 528 U.S. 1092; Bracy v. Gramley, 520 U.S. 899, 904 (1997) (stating that unlike other civil litigants, a habeas corpus petitioner is not entitled to broad

discovery). Rule 6(a) of the Rules Governing § 2254 Cases permits discovery "only in the discretion of the court and for good cause shown." Rich, 187 F.3d at 1068. Rule 6(b) further provides that "[a] party requesting discovery must provide reasons for the request." Rule 6(b), 28 U.S.C. foll. § 2254.

Further, AEDPA "restricts the ability of a federal habeas court to develop and consider new evidence." Shoop v. Twyford, 142 S. Ct. 2037, 2043-44 (2022). "Review of factual determinations under [28 U.S.C.] § 2254(d)(2) is expressly limited to "the evidence presented in the State court proceeding." Shoop, 142 S. Ct. at 2043-44. A court considering a habeas corpus petition is ordinarily limited to the state court record. See Cullen v. Pinholster, 563 U.S. 170, 180 (2011) (holding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits").

If the petitioner "failed to develop the factual basis of a claim in State court proceedings," this court may admit new evidence only in two limited situations. 28 U.S.C. § 2254(e)(2). The claim must rely on a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by the Supreme Court, or it must rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A). In addition, even if the petitioner can satisfy one of those two exceptions, petitioner must also show that the desired evidence would demonstrate, "by clear and convincing evidence," that "no reasonable factfinder" would have convicted petitioner of the charged crime. § 2254(e)(2)(B).

Initially, the undersigned agrees with respondent that petitioner should not be granted leave to conduct discovery on unexhausted claims. Calderon v. U.S. Dist. Court for the Eastern Dist. of California (Sacramento), 113 F.3d 149 (9th Cir. 1997).

Nevertheless, the undersigned reviewed the record in this matter and determined that petitioner failed to demonstrate good cause. Petitioner does not claim that he is relying on a "new and previously unavailable rule of constitutional law." Shoop, 142 S. Ct. at 2044. Petitioner does not allege that his petition or his proposed new claims rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." Id. Indeed, petitioner

provided documents demonstrating that the evidence was disclosed to the defense by June of 2018, prior to trial. (ECF No. 20 at 9-12.) Petitioner also offered no specific facts showing that the requested evidence would demonstrate, by clear and convincing evidence, that no reasonable factfinder would have convicted petitioner of second degree murder.

Accordingly, petitioner's discovery motion should be denied.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Petitioner's motion for stay (ECF No. 19) be denied; and

2. Petitioner's motion for discovery (ECF No. 20) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 1, 2023

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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